In the Supreme Court

OF THE

United States

(27)

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OCTOBER TERM, 1943

No. 224

VERTEX INVESTMENT COMPANY
(a corporation),
Petitioner,

vs.

NORMA B. SCHWABACHER, individually, and NORMA B. SCHWABACHER and SAMUEL I. SCHWABACHER, as executors of the last will and testament of Louis A. Schwabacher, deceased; FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE, FIFTH DOE and SIXTH DOE,
Defendants,

NORMA B. SCHWABACHER, individually, and NORMA B. SCHWABACHER, as executrix of the last will and testament of Louis A. Schwabacher, deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the District Court of Appeal, State of California,
First Appellate District.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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First Appellate District.

To the Honorable Harlan Fiske Stone, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

The above named petitioner respectfully requests that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of California, First Appellate District, Division One, upon the grounds hereinafter set forth:

I. JURISDICTIONAL STATUTE.

The jurisdiction of this court is invoked under Section 237(b) of the Judicial Code, as amended (sec. 344 (b) U. S. C.), which provides in part:

> "It shall be competent for the Supreme Court, by certiorari, to require that there shall be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution * * *."

II. OPINIONS BELOW.

The trial court and California Supreme Court filed no written opinion, but the opinion of the District Court of Appeal of the State of California, First Appellate District, Division One, review of whose judgment is here sought is reported in 57 A. C. A.

410 and in 134 Pac. (2d) 891. (R. 174-245.) In accordance with that opinion judgment was entered March 1, 1943, and became final May 1, 1943. (R. 248.)

III. SUMMARY OF MATTER INVOLVED.

On December 4, 1940, petitioner filed in the Superior Court of the State of California, in and for the City and County of San Francisco, its amended complaint setting forth facts entitling petitioner to relief from a court of equity for the wrongs committed against it. (R. 2-58.) Under appropriate local court rules respondent filed a demurrer to that complaint which was orally argued to the trial court on December 23, 1940, and briefed fully by written memoranda. (R. 124-126, 52-61.)

The trial court is divided into eighteen departments, each one of which is presided over by a different judge. One of such departments is the law and motion department, presided over at the time by Honorable Thomas M. Foley, whose duties required the hearing and disposition of matters such as respondent's demurrer to petitioner's amended complaint. (R. 124-125.)

On February 19, 1941, Judge Foley made his order overruling respondent's demurrer to petitioner's amended complaint and granting respondent ten days within which to answer the complaint. (R. 126.) Notice thereof was given to respondent's counsel (R. 126-127), who by letter to Judge Foley argued that the order overruling respondent's demurrer was er-

roneous. (R. 131-142.) Three several letters to such effect were written to the judge by respondent's counsel and answered by petitioner's counsel (R. 131-162), the last of such letters being dated March 14, 1941. (R. 159.)

Subsequently, and on March 31, 1941, Judge Foley was, by order of the presiding judge of the trial court, displaced in the law and motion department by Judge McWilliams, who, so far as pertinent here, at all times thereafter presided over such law and motion department. (R. 128-129.)

Then on April 10, 1941, Judge Foley made an order vacating his previous order overruling respondent's demurrer to petitioner's amended complaint, and sustained that demurrer, denying petitioner any leave to amend its complaint. (R. 162.) The following day Judge Foley signed and filed a judgment in the cause against petitioner and in favor of respondent, the result of which denied petitioner any and all relief. (R. 164-165, 62-63.)

Petitioner took an appeal from such judgment to the Supreme Court of the State of California (R. 64-65), which transferred the matter for hearing and decision to the District Court of Appeal of the State of California, First Appellate District, Division One. (R. 173.) That court rendered its opinion on March 1, 1943, affirming the judgment of the trial court, with one justice dissenting and filing a separate opinion. (R. 174-245.) A petition for a rehearing was filed by petitioner, but denied by the court on March 31, 1943, with the dissenting justice voting for a re-

hearing. (R. 246.) Thereafter a petition for a hearing by the California Supreme Court was filed and denied by that court on April 29, 1943, with two of the Supreme Court justices voting in favor of granting such petition. (R. 247.)

IV. QUESTION PRESENTED.

It is contended by petitioner that the trial court had no jurisdiction to change its ruling on respondent's demurrer to petitioner's complaint and enter judgment against petitioner without notice to petitioner that any such proceedings were pending or contemplated.

Concisely stated, the question may be put, as follows:

> Does not an ex parte order, made without notice to a litigant and depriving it of its cause of action, violate the due process clause of the Fourteenth Amendment to the Constitution of the United States?

Petitioner raised this question at the first opportunity in the presentation of its bill of exceptions on appeal from the void judgment of the trial court. (R. 163-166.) With respect thereto the majority opinion of the California District Court of Appeal states, petitioner being referred to as plaintiff (R. 177-179):

> "Plaintiff contends that even though the order sustaining the demurrer would have been proper had it been the original decision of the court, the

judge was without jurisdiction in the circumstances here to change his first ruling. The order overruling the demurrer was made on February 19, 1941. On March 3, 1941, counsel for defendant wrote a letter to the judge making a 'request that the previous order overruling our demurrer be vacated and the matter reopened for further consideration.' The letter called the court's attention to a decision in another state, which had appeared in the reports after the argument and filing of briefs in this case. Counsel urged that this decision was strong authority in defendant's favor. A copy of the letter was sent to plaintiff's counsel. On March 6, 1941, counsel for the plaintiff wrote a letter to the judge in answer to defendant's letter. Counsel for each side thereafter wrote two further letters to the judge, sending copies to opposing counsel. The last letter was written by plaintiff's counsel on March 14, 1941. On April 10, 1941, the judge made the order sustaining the demurrer without leave to amend and rendered judgment on the following day. No motion for reconsideration was made in open court and no formal notice of motion given.

Plaintiff contends that the court was without jurisdiction to change its ruling except pursuant to a motion made in court, and that it was required that notice of motion be given or waived. Plaintiff further contends that after the order overruling the demurrer had been made by the judge of the law and motion department, the case automatically passed to the jurisdiction of the presiding judge by force of the court rules, and the order changing the ruling on demurrer was beyond the jurisdiction of the judge of the law and motion department unless reassigned by the

presiding judge, which was not done here. It is further contended that since the judge who made the original ruling ceased to be the judge of the law and motion department on March 31, 1941, he was without right on April 10, 1941, to make the order sustaining the demurrer, such matters being within the sole jurisdiction of the law and motion judge.

We are of the view that the judge who originally ruled upon the demurrer had jurisdiction to change his decision by reason of the fact that it was he who originally ruled on the demurrer, even though at the time of the changed ruling he was no longer judge of the law and motion department. A ruling on demurrer, unlike many other types of judicial determinations, may be changed for no other reason than that the judge is of the view that his first ruling was erroneous. (*De La Beckwith v. Superior Court,* 146 Cal. 496; *Kelly v. Liddicoat,* 35 Cal.App.2d 559; *Howe v. Board of Supervisors,* 118 Cal.App. 306; 21 Cal.Jur. 124.) Proceedings had in court, pursuant to notice given or waived, when the demurrer was first argued are the basis for the changed ruling as for the original decision, and an additional motion and notice are not required."

V. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

It is important to every litigant that he be advised of all action directly affecting his rights in a pending suit, and that he be not deprived of those rights without an opportunity to be heard. This is consistent

with the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. Elementary as this principle may seem, this court has never directly decided it.

In *Pennoyer v. Neff,* 95 U. S. 714, 24 L. Ed. 565, a counterpart of the problem was presented and ruled upon. There this court held that no rights *in personam* could be obtained by substituted service upon a non-resident, it being said (95 U. S. 733, 24 L. Ed. 572):

> "Since the adoption of the 14th Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction, do not constitute due process of law."

No less, it follows that it is not consistent with due process of law to abuse jurisdiction once acquired by directly deciding a party's rights without notice to him.

As a matter of fact the California Supreme Court has held that lack of jurisdiction extends to a situation "where, though a court has jurisdiction over the subject matter and parties in the fundamental sense, it has no 'jurisdiction' (or power) * * * to act without the occurrence of certain procedural prerequisites." (*Abelleira v. District Court of Appeal,* 17 Cal. (2d) 280, 288, 109 Pac. (2d) 942.) Certainly, the summary dismissal of a party's cause of action

without giving him an opportunity to be heard is lack of jurisdiction within the California Supreme Court's definition, and inconsistent with due process of law.

It was said in *Coe v. Armour Fertilizer Co.,* 237 U. S. 413, 424, 59 L. Ed. 1027, 1032:

> "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires."

More recently it was said by Justice Brandeis in *Brinkerhoff etc. Sav. Co. v. Hill,* 281 U. S. 673, 682, 74 L. Ed. 1107, 1114:

> "* * * But while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

To the same effect is *Hansberry v. Lee,* 311 U. S. 32, 40, 85 L. Ed. 22, 26. The California Appellate Courts have repeatedly followed the same principle. (*Harth v. Ten Eyck,* 16 Cal. (2d) 829, 834, 108 Pac. (2d) 675; *Grinbaum v. Superior Court,* 192 Cal. 528, 540-541, 221 Pac. 635; *Younger v. Superior Court,* 136 Cal. 682, 69 Pac. 485.)

Despite the clear enunciation of the basic right, the California District Court of Appeal has ruled that petitioner's constitutional rights have not been impaired by an *ex parte* proceeding which denied petitioner the right to litigate its just claim. Petitioner was given no notice that its rights were to be affected, directly or indirectly; and the lower Appellate Court has held that no such notice is or was necessary. This could not be due process, no matter what the definition of the term.

Respondent may argue that the California Appellate Court upheld her technical legal defense and that petitioner, consequently, has no cause to complain. Sufficient answer to this may be found in *Coe v. Armour Fertilizer Co.*, 237 U. S. 413, 424, 59 L. Ed. 1027, 1032, where it is said:

> "* * * To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits."

So, also, in *Pennoyer v. Neff*, 95 U. S. 714, 728, 24 L. Ed. 565, 570-571, this court stated:

> "* * * the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently."

VI. CONCLUSION.

Petitioner submits that the within petition presents a question which should be heard and decided by this court, and that, consequently, a writ of certiorari should issue as requested.

Dated, San Francisco, California,
July 21, 1943.

Respectfully submitted,
PHILIP S. EHRLICH,
Attorney for Petitioner.

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No. 224

VERTEX INVESTMENT COMPANY
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vs.

NORMA B. SCHWABACHER, etc.,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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No. 224

VERTEX INVESTMENT COMPANY
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Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE FACTS.

This was an action filed by petitioner in a California State Court for relief to which petitioner claimed to be entitled under principles of law as administered in California. A demurrer to an amended complaint on the ground that the action was barred by the Statute of Limitations (*California Code of Civil Procedure*, Section 338, subd. 4) was sustained. Judgment was entered on the order sustaining the demurrer and was affirmed by the

District Court of Appeal which heard the case on appeal. Petitioner now seeks to come into this Court on a minor issue by garbing it in the disguise of a constitutional question of due process.[1]

The demurrer to the amended complaint had first been overruled. Three days after receiving notice (R. 127), defendants' counsel wrote a letter to the court, rearguing the case and requesting that "the order of February 20 should be vacated and the demurrer to plaintiff's complaint sustained." (R. 131-132) A copy was sent to petitioner's counsel (R. 142), who immediately replied by a letter to the court in which he did not raise any objection to the court's power of jurisdiction to vacate the order or to enter a new order sustaining the demurrer but, joining issue on the legal questions raised in the defendant's letter, urged that the demurrer should not be sustained (R. 142-146). Further interchange of letters took place, the defendants' counsel writing two, and the petitioner's counsel writing three (R. 147-162), in each of which he argued the merits of the issue of the Statute of Limitations. A few days afterwards the judge ceased to preside in the Law and Motion Department, and shortly thereafter, disposing of all matters submitted to him while he was Law and Motion judge, vacated his order overruling the demurrer and sustained the demurrer without leave to amend (R. 162-163). Pursuant to California practice, judgment was then entered.

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[1]The petition (pp. 4, 5) states that there was a dissenting opinion in the Appellate Court. The dissent, however, was with respect to the merits of the demurrer, and not the question discussed in the petition for certiorari.

It is thus wholly erroneous to say, as petitioner does, that its cause of action was dismissed without giving it an opportunity to be heard. It was fully heard in the court below, both before and after reconsideration was requested. Then it appealed, and the question whether the amended complaint stated a cause of action or was barred by the Statute of Limitations was presented to the District Court of Appeal. Before that tribunal the petitioner had the fullest opportunity to be heard, and was heard, both orally and by lengthy printed briefs.

The question now tendered by petitioner is whether the petitioner was deprived of due process of law in violation of the Fourteenth Amendment.

DISCUSSION.

I.

THE PETITION FOR WRIT OF CERTIORARI HAS BEEN FILED TOO LATE.

The judgment of the District Court of Appeal to which a writ of certiorari is sought was rendered March 1, 1943 (R. 248). It became final, with respect to the District Court of Appeal, within thirty days, and the power of the State Supreme Court to review it expired within sixty days. The judgment thus became final on April 29, 1943 (*Constitution of California,* Article VI, Sec. 4c).[2] Conse-

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[2]Article VI, Section 4c, of the California Constitution provides as follows:

"The supreme court shall have power to order any cause pending before the supreme court to be heard and determined by a district court of appeal, and to

quently a petition for writ of certiorari, filed after July 29, 1943 was too late (Title 28, U.S.C., Sec. 350). The petition was not filed until August 3, 1943.

II.

THE ALLEGED FEDERAL QUESTION WAS NOT SPECIALLY SET UP OR CLAIMED BY THE PETITIONER IN THE COURTS BELOW.

The petitioner declares (p. 5) that it "raised this question [of due process under the Fourteenth Amendment] at the first opportunity in the presentation of its bill of exceptions," citing pages 163-166 of the record. This is erroneous. While objecting that the trial judge had no power to change its ruling on demurrer in the manner in which he had done so, the petitioner did not, in its bill of exceptions or elsewhere in the record, invoke the federal constitution. The record nowhere discloses that any "title, right, privilege or immunity [was] specially set up or claimed . . . under the Constitution." (Cf. *American Surety Co. v. Baldwin,* 287 U. S. 156, 77 L. Ed. 231.)

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order any cause pending before a district court of appeal to be heard and determined by the supreme court. The order last mentioned may be made before judgment has been pronounced by a district court of appeal, or within fifteen days in criminal cases, or thirty days in all other cases, after such judgment shall have become final therein. The judgment of the district courts of appeal shall become final therein upon the expiration of fifteen days in criminal cases, or thirty days in all other cases, after the same shall have been pronounced."

III.

THE PETITION IS WITHOUT MERIT.

We submit that the petition is wholly frivolous.

The petitioner was subject to the jurisdiction of the State Court because, by filing its complaint, it had voluntarily subjected itself to that jurisdiction. No question is here presented such as was involved in the cases cited by petitioner (*Coe v. Armour Fertilizer Works,* 237 U.S. 413, 59 L. Ed. 1027; *Grinbaum v. Superior Court,* 192 Cal. 528, 221 Pac. 635; *Hansberry v. Lee,* 311 U.S. 32, 85 L. Ed. 22), where the complaining party was not the actor and no proper process had been served on him.

The Fourteenth Amendment does not prescribe rules of procedure and practice for state courts or subject to federal review claims of irregularity in local practice or procedure (*Iowa Central Ry. Co. v. Iowa,* 160 U.S. 389, 393, 40 L. Ed. 467; *Louisville & N. R. Co. v. Schmidt,* 177 U.S. 230, 44 L. Ed. 747).

Nothing in the Fourteenth Amendment prohibits the division of state courts into departments, restricts the power of a judge in a given department, or limits his right to pass on a question presented to him in one department after he has been assigned to another (Cf. *Goldsmith v. Prendergast Construction Co.,* 252 U.S. 12, 18, 64 L. Ed. 427). It is the law of California that division of a Superior Court into departments is only for convenience of the dispatch of business, that there is but one court, and that any of its judges may exercise all its power and jurisdiction; exercise by a judge in one department of power

in a case assigned to another is, at best, an irregularity not affecting the jurisdiction or furnishing grounds for reversal[3] except in a situation[4] held not to exist here. (R. 179, second paragraph.)

Petitioner had received service of the demurrer (R. 61). The Fourteenth Amendment does not prescribe how a state court shall pass upon demurrers or restrict the right of reconsideration (Cf. *Moss v. Ramey,* 239 U.S. 538, 60 L. Ed. 425). It is the law in California that a ruling on demurrer is an interlocutory or intermediate ruling and, like a ruling on evidence in the course of a trial, may be considered and changed at any time before the entry of judgment.[5]

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[3]*People v. Grace,* 77 Cal. App. 752, 247 Pac. 585;
City of Los Angeles v. Oliver, 102 Cal. App. 299, 283 Pac. 298;
Graziani v. Denny, 174 Cal. 176, 162 Pac. 397;
Tubby v. Tubby, 202 Cal. 272, 260 Pac. 294;
People v. Martino, 113 Cal. App. 661, 299 Pac. 86;
In re Johnson, 101 Cal. App. 110, 281 Pac. 435;
Haines v. Commercial Mortgage Co., 206 Cal. 10, 273 Pac. 35;
People v. Barbera, 78 Cal. App. 277, 248 Pac. 304.

[4]*Williams v. Superior Court,* 14 Cal. (2d) 656, 96 Pac. (2d) 334.

[5]*De La Beckwith v. Superior Court,* 146 Cal. 496, 80 Pac. 717;
O'Neill v. Hicks, 101 Cal. App. 374, 281 Pac. 531;
City of Los Angeles v. Oliver, 102 Cal. App. 299, 326; 283 Pac. 298;
Howe v. Board of Supervisors, 118 Cal. App. 306, 5 Pac. (2d) 28;
Wrightson v. Dougherty, 5 Cal. (2d) 257, 265; 54 Pac. (2d) 13;
Kelly v. Liddicoat, 35 Cal. App. (2d) 559, 96 Pac. (2d) 186;
Cf. *MacAdoo v. Oregon City Manufacturing Co.,* 9 Cir., 71 F. (2d) 879, 882.

The Fourteenth Amendment does not prescribe the manner or form, or the species of notice, or the quantity of formality, by which a demurrer or other motion is brought on to be heard in a state court. The due process clause is concerned with substance, not form (Cf. *Simon v. Craft,* 182 U.S. 427, at 436; 45 L. Ed. 1165). It is the law of California that even an oral application without formal notice is sufficient;[6] that where an opposing party contests an application, objections concerning notice are waived;[7] and that defects, if any, in proceedings not going to substantial rights of the parties are ignored.[8]

Here the petitioner received notice—by letter—that the defendant requested a reconsideration, and by numerous letters to the judge participated in arguing and contesting the application. If one has actually been heard he may not complain about deprivation of due process (*Lynde v. Lynde,* 181 U.S. 183, 45 L. Ed. 810).

Assuming that the Fourteenth Amendment requires that a litigant in a state court have an opportunity to be heard on every motion or upon any reconsideration by the court of a matter previously argued, there is nothing in the Fourteenth Amendment which prescribes that he shall receive that opportunity in one department instead of in

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[6] *Wrightson v. Dougherty,* supra;
Howe v. Board of Supervisors, supra.

[7] *Simmons v. Simmons,* 45 Cal. App. (2d) 695, 114 P. (2d) 659.

[8] 2 *Cal. Jur.* 1004;
California Code of Civil Procedure, Sec. 475;
Constitution of California, Article VI, Sec. 4½.

another, or that he shall receive it at one stage of the hierarchy of the state courts instead of at another, or that, if he has failed to receive it at *nisi prius,* it is not sufficient that he has received it in an appellate court (Cf. *Wilson v. Standefer,* 184 U.S. 399, at 415; 46 L. Ed. 612; *Bourjois, Inc. v. Chapman,* 301 U.S. 183, 81 L. Ed. 1027). Here, even assuming that the petitioner had failed to receive the opportunity to be heard in the trial court on the question of the sufficiency of its amended complaint, it was fully heard in the appellate court. The question involved, having arisen on a demurrer to a pleading, was solely one of law, and the review of the appellate court was as complete and extensive as the consideration of the trial court. Not until the decision of the appellate court did the judgment become final. It is enough that the sufficiency of petitioner's pleading was determined by an appellate court before which it was fully heard. (*Iowa Central Ry. Company v. Iowa,* 160 U.S. 389, 40 L. Ed. 467; *Louisville & N. R. Co. v. Schmidt,* 177 U.S. 230, 239; 44 L. Ed. 747.)

Petitioner seeks to anticipate the objection that the appellate court has adjudged that it had no cause of action, by stating (p. 10) that it is no answer to say to one who has been deprived of his property without due process that due process would have led to the same result. The statement overlooks the fact that the adjudication occurred after the plaintiff was fully heard by the appellate court. Due process is not concerned with which of the courts of the state grants the hearing.

It is respectfully submitted that the petition is utterly without merit and should be denied.

Dated, San Francisco, California,
August 18, 1943.

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MOSES LASKY,
Of Counsel.